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No. 94-1918

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

TEXANS UNITED EDUCATION FUND,
Petitioner,
v.
TEXACO INC. and TEXACO CHEMICAL CO.,
Respondents.

Petition For a Writ of Certiorari
To the Supreme Court Of Texas

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. May a petitioner before the United States Supreme Court raise federal constitutional issues for the first time in its petition for writ of certiorari without having ever presented those issues to any lower court which has considered the case?

2. Under Texas Rules of Civil Procedure, may a party file an intervention in a lawsuit after the trial court has lost plenary jurisdiction over the case?

3. Does Texas Rule of Civil Procedure 76a (concerning sealing orders) apply to documents which are privileged from production, documents which are made a part of the public court record, or documents which have never been the subject of a sealing order?

4. Do the Texas rules regarding recusal of judges require that the entire Texas Supreme Court recuse itself in a case in which the only issue presented involves the jurisdiction of a trial court to entertain a petition in intervention?

LIST OF PARTIES

The undersigned counsel of record certifies that the following listed persons were parties to the proceeding in the court whose judgment is sought to be reviewed.

1. Texans United Education Fund, Petitioner.

2. Valorie Davenport, Petitioner and Co-Counsel for original party Plaintiff, John R. Sexton.

3. Texaco Inc., Respondent.

4. Texaco Chemical Company, Respondent.

5. John R. Sexton, original party Plaintiff.

Non-wholly owned affiliates of Texaco Inc. include Canyon Reef Carriers, Inc., LOOP, Inc., Williston Basin Prospects Partnership, and PIRO Implementation, Inc. Non-wholly owned subsidiaries of Texaco Inc. include El Capitan Mutual Water Company, Four Star Oil & Gas Company, Texaco Canada Petroleum, Inc. Non-wholly owned joint ventures of Texaco Inc. include Hobson TEX-1 Mine, Lake De Smet Synfuels Project, and Pekin Energy Company. Texaco Chemical Co. was a wholly owned subsidiary of Texaco Inc. which has now been sold to Huntsman Financial Group.

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BRIEF IN OPPOSITION

JURISDICTIONAL STATEMENT

Texaco Inc. and Texaco Chemical Co. ("Texaco"), Respondents, object to the attempt by Texans United Education Fund, Petitioner, to invoke this Court's jurisdiction. Petitioner cites 28 U.S.C.A. §1254(1) as its basis for this Court's jurisdiction. This jurisdictional statute applies to cases decided by United States Courts of Appeals. The instant case arises from an opinion issued by the Texas Supreme Court. As such, Petitioner has failed to properly invoke the jurisdiction of this Court.

Further, even if Petitioner had cited the appropriate jurisdictional statute regarding review of opinions issued by state courts, it still cannot show, based on the facts involved in this case, that this Court has jurisdiction over this matter. Petitioner cannot meet any of the three jurisdictional standards for review by this Court of a state court opinion. Specifically, this case does not involve any properly

preserved issues regarding:

1. the validity of a treaty or statute of the United States;

2 the validity of a statute of any state on the ground of it being repugnant to the United States Constitution; or

3. any title, right, privilege, or immunity specially set up or claimed under the United States Constitution.

Because Petitioner has failed to properly invoke this Court's jurisdiction, the Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari (the "Petition") filed by Texans United Education Fund ("Petitioner") results from the trial court's dismissal of Petitioner's Motion to Intervene for want of jurisdiction. It concerns the application of Tex. R. Civ. P. 76a to certain Texaco documents. The trial court considered and rejected Petitioner's argument that Tex. R. Civ. P. 76a, concerning sealing orders, provided continuing jurisdiction in this case, found that no sealing order had been entered, and found that there was no continuing jurisdiction for its further consideration of the case. Petitioner additionally argued that Rule 76a should apply to documents submitted for *in camera* review, although Rule 76a by its own terms does not apply to such documents. The trial court's order was considered by the state district court of appeals which also dismissed the appeal for want of jurisdiction. Petitioner then sought review by the Texas Supreme Court which denied such review.

Petitioner has filed the Petition following an unsuccessful appeal from an original action in the 215th District Court of Harris County, Texas ("Original Action"). In the Original Action, John Sexton ("Sexton"), a former Texaco employee, sued Texaco, alleging employment torts, age discrimination, and that Texaco fired him for reporting various safety violations.[1]

In the course of discovery in the Original Action, Sexton requested and received voluminous documents from Texaco, including various documents relating to safety matters at some Texaco facilities (the "Safety Documents"). Sexton filed most, if not all, of these Safety Documents as exhibits to various pleadings in the Original Action. The discovery documents filed in the trial court are a part of its official records and will, therefore, be retained by the Clerk as a part of the permanent court files, available for public inspection. Texaco never requested or obtained a sealing order pursuant to Texas Rule of Civil Procedure 76a with respect to any of these documents. Texaco did file a Motion for Protective Order in regard to twenty-one documents and submitted those documents for *in camera* inspection, under claims that such documents were privileged. The trial court granted Texaco's Motion for Protective Order with respect

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[1] It should be noted that throughout the appellate process in this case, Valerie Davenport, original co-counsel for Sexton, and current counsel for Petitioner, has been named a party to this proceeding. As noted in footnote 1 of the Petition filed with this Court, Ms. Davenport has consistently maintained the position that she had an ethical duty to contest the settlement agreement in the Original Action to the extent that it violated the Texas Rules of Civil Procedure. Despite this argument, and despite the Supreme Court Rule 12.4 which deems parties below to be parties in any proceeding before this Court, Ms. Davenport has failed to list herself as a party to the Petition. Texaco can only assume that Ms. Davenport has chosen to no longer assert her argument regarding her alleged ethical obligations.

to those twenty-one documents, after finding they were privileged and not subject to production.

Sexton sought review of this Protective Order, as well as an April 1991 Protective Order entered into by the parties in a mandamus action to the First District Court of Appeals for the State of Texas ("Mandamus Action"). The parties subsequently reached a settlement of the Original Action through mediation. The settlement agreement provided, among other things, for Sexton's return of documents produced to him by Texaco in discovery. The Original Action was dismissed by the trial court on joint motion of Texaco and Sexton, by order entered February 18, 1992. In spite of actions by Petitioner's counsel (then Sexton's co-counsel) to stop such dismissal, the First Court of Appeals dismissed the Mandamus Action on July 7, 1992, without granting the Rule 76a relief sought by such counsel.

More than thirty days after dismissal of the Original Action, Petitioner filed its Petition in Intervention and other pleadings in the Original Action. Petitioner argued that the trial court still had jurisdiction under the provisions of Rule 76a of the Texas Rules of Civil Procedure which provides for continuing trial court jurisdiction in matters where the court has granted a sealing order under the provisions of Rule 76a. The trial court fully considered the possible application of Rule 76a and rejected it, dismissing Petitioner's Motions, finding (1) that no sealing order had been requested or entered and (2) that it did not have jurisdiction to hear the Motions. The trial court then dismissed Petitioner's Petition in Intervention.

Petitioner appealed the trial court's order of dismissal to the Fourteenth District Court of Appeals for the State of Texas. The Court of Appeals affirmed the trial court's finding that there was no continuing jurisdiction under Rule

76a in this case, and that the Petition in Intervention had been filed outside of the trial court's jurisdictional time limits. Based on these findings, the Court of Appeals dismissed Petitioner's appeal for want of jurisdiction.

Petitioner next sought review of the opinion of the Court of Appeals before the Texas Supreme Court. Petitioner's Application for Writ of Error was filed with the Texas Supreme Court on September 30, 1993. On September 1, 1994, the Texas Supreme Court issued an order denying the writ of error requested by Petitioner. On September 14, 1994, after the Texas Supreme Court's ruling, and a full year after originally filing its application, Petitioner filed a motion asking that the entire Texas Supreme Court recuse itself from the consideration of this case. This motion was denied. Petitioner filed motions for rehearing regarding both the Application for Writ of Error and the Motion for Recusal. After due consideration, the Texas Supreme Court denied both motions for rehearing. Following such denial, Petitioner filed the instant Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

Petitioner has failed to present this Court with any justifiable basis for granting its Petition for Writ of Certiorari. Petitioner failed to preserve any federal constitutional question for review by this Court by failing to present any such issue to the Courts below. Further, Petitioner's arguments regarding the constitutional implications of Texas Rule of Civil Procedure 76(a) are moot. Finally, Petitioner cannot establish that the Texas Supreme Court violated any constitutional right of Petitioner by declining to recuse itself from consideration of this case.

REASONS FOR DENYING THE WRIT

I. Petitioner has failed to preserve any federal question for review by this Court by failing to present any such issue to the courts below.

A. Applicable facts

Each of the questions presented by Petitioner in its Petition has federal constitutional implications. Petitioner alleges as its basis for the issuance of a writ of certiorari violations of the due process, access to the courts, and free speech/free press clauses of the federal constitution. Petitioner, however, is precluded from raising these issues because they were never presented to the courts below which have considered this case.

Petitioner raised no federal constitutional questions before either the trial court or the state district court of appeals. Likewise, Petitioner raised no federal constitutional question in its original Application for Writ of Error to the Texas Supreme Court. It was not until Petitioner filed its Motion to Recuse the Texas Supreme Court and its Motion for Rehearing of the Application For Writ of Error that any reference was made to the federal constitution. These references, however, are insufficient to preserve review of what Petitioner now alleges are violations of its constitutional rights.

In its Motion to Recuse, Petitioner made the following statement:

> Although the remedy or method of effectuating relief may not be as clearly defined when the challenge is made to all sitting jurists on the state's highest court, the

> right to a hearing by a neutral magistrate, at least as to the merits of a motion to recuse, must be preserved. Therefore, based on the guarantees of due process under the state and federal constitutions . . . Petitioners . . . respectfully request the voluntary recusal of those affected justices. . . .

Likewise, in its Motion for Rehearing of the Application for Writ of Error, Petitioner stated:

> It is inconceivable that any court would rely upon the testimony of one interested witness and find it sufficient to satisfy the requirement of a public hearing justifying the restriction of citizens' statutory rights under Rules 76 and 76a and the public and press' rights under the First Amendment to the United States Constitution.

These are the only references to the federal constitution contained in any pleading presented to any court which has previously considered this case.

B. Applicable law

Supreme Court Rule 14(h) states:

> If review of a judgment of a state court is sought, the statement of the case shall also specify the stage of the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and

> such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

Rules of the Supreme Court of the United States 14(h).

Further, this Court has ruled that vague references to constitutional provisions contained in post-decision motions are insufficient to preserve constitutional questions for review by writ of certiorari. In *Bankers Life & Casualty Co. v. Crenshaw,* 108 S.Ct. 1645 (1988), this Court considered a case in which the petitioner made vague references to violations of "due process, equal protection, and other constitutional standards" in its motion for rehearing before the Mississippi Supreme Court. *Id.* at 1649. This Court held that such vague references failed to preserve petitioner's constitutional challenges. *Id.* at 1650.

C. Conclusion

Petitioner has failed to preserve any of the complaints upon which it bases its request for a writ of certiorari. No due process claims were presented to any lower court with reference to the matters made the subject of the Application for Writ of Error to the Texas Supreme Court. The only constitutional claim regarding the Application was a vague reference to the First Amendment to the United States Constitution, contained in Petitioner's Motion for Rehearing. This reference was not specific enough to preserve any

constitutional claim. Likewise, regarding Petitioner's Motion to Recuse the entire Texas Supreme Court, only a vague reference to due process claims was made. As this Court has previously held, such vague references do not preserve any federal question for review by writ of certiorari. Therefore, absent any federal question being preserved for review by this Court, the Petition for Writ of Certiorari should be denied.

II. Petitioner's arguments regarding the constitutional implications of Tex. R. Civ. P. 76a are moot because Petitioner failed to timely intervene in the underlying suit and because no sealing order was entered which would provide the trial court with continuing jurisdiction.

Petitioner failed to file its Motion in Intervention within the trial court's jurisdictional time limit. As such, the courts which have previously reviewed this case have been correct in denying Petitioner any relief.

A. Petitioner filed its Motion in Intervention more than thirty (30) days after the trial court signed its final order of dismissal.

On February 18, 1992, the trial court judge signed a final order of dismissal in the Original Action, which provided:

> BEFORE THE COURT is the joint Motion of Plaintiff JOHN R. SEXTON, and Defendants, TEXACO INC., TEXACO CHEMICAL COMPANY, L. GARBRECHT, JR., and W. B. REALS, to dismiss with prejudice the above-entitled and numbered cause. The Court, having reviewed the motion, is of the

> opinion that Plaintiff and Defendants have released and settled all claims and matters in controversy between them.
>
> It is therefore, ORDERED that the Plaintiff's claims as set forth in Plaintiff's First Amended Original Petition are hereby DISMISSED with prejudice. It is ORDERED that the Counterclaim asserted by Defendants in their First Amended Original Answer and Counterclaim is hereby DISMISSED with prejudice. It is further ORDERED that the above entitled and numbered cause is hereby DISMISSED from the Court's docket.
>
> SIGNED this 18th day of February, 1992.

Texas Rule of Civil Procedure 329b clearly provides that, absent some special provision extending jurisdiction, a trial court loses its plenary jurisdiction over an action thirty (30) days after the order of dismissal is signed, where no motion for new trial is filed. Rule 329b provides:

> Rule 329b. Time for filing motions . . .
>
> (a) A Motion for new trial, if filed, shall be filed prior to or within thirty (30) days after the judgment or other order complained of is signed . . .
>
> . . . .
>
> (d) the trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify,

> correct, or reform the judgment within thirty (30) days after the judgment is signed.

No motion for new trial or notice of appeal was filed in this case in regard to the trial court's dismissal order entered on February 18, 1992. Therefore, on March 20, 1992, the trial court lost plenary jurisdiction to alter or amend its judgment and/or to hear further matters connected with the underlying lawsuit, including Intervenors' Motions. *See Christopher v. Fuerst,* 709 S.W.2d 266 (Tex. Civ. App.--Houston [14th Dist] 1986, writ ref'd n.r.e.) (trial court lost jurisdiction over action thirty (30) days after signing order dismissing action where no motion for new trial was filed); *Jackson v. Van Winkle,* 660 S.W.2d 807 (Tex. 1983) (trial court loses plenary jurisdiction thirty (30) days after judgment in the absence of a timely filed motion for a new trial so that any action taken after the expiration of thirty (30) days from the judgment is a nullity); *Smith v. Birdwell,* 619 S.W.2d 445 (Tex. Civ. App.--Corpus Christi 1981, writ ref'd n.r.e.) (trial court has no jurisdiction to correct judgment since thirty (30) days had passed after judgment had been entered).

In the case of *First Alief Bank v. White*, 682 S.W.2d 251 (Tex. 1984), the Texas Supreme Court considered the time during which a motion in intervention may be filed. The court held that there is no trial court jurisdiction for hearing a Plea in Intervention if it is filed more than thirty (30) days after judgment. In so holding, the court stated:

> Under the present facts, Judge White retained plenary power to vacate, set aside, modify or amend the judgment for a period of thirty (30) days after he signed it. *Thursby v. Stoval,* 647 S.W.2d 953 (Tex 1983); *McCormack v. Guillot,* 597 S.W.2d 345 (Tex. 1980); Tex.

> R.Civ. P.329(d) and (f). Judge White's plenary power over his judgment expired on June 2, 1984, and he, therefore, lacked jurisdiction to modify that judgment. Further, a plea in intervention comes too late if filed after judgment, and may not be considered unless and until the judgment has been set aside. *Comal County Rural High School District No. 705 v. Nelson,* 158 Tex. 564, 314 S.W.2d 956 (1958).

Id. at 252.

In the instant case, the trial court entered its final order of dismissal on February 18, 1992. Petitioner failed to file its petition in intervention until August 6, 1992, far more than thirty (30) days after the trial court's dismissal of the Original Action. As such, Petitioner's Motion in Intervention was filed after the trial court had already lost jurisdiction over the Original Action.

B. Texas Rule of Civil Procedure 76a did not operate to extend the trial court's jurisdiction.

Throughout its appeal of the trial court's decision, Petitioner has defined two groups of documents which it alleges are subject to the strictures of Tex. R. Civ. P. 76a. These documents include:

1. Twenty-one safety related potential accident liability evaluations, (P.A.L.E. reports), which were submitted to the 215th Judicial District Court of Harris County, Texas, for *in camera* inspection and held pending the outcome of a petition for writ of mandamus; and

2. Safety related documents and depositions which were produced to Sexton by Texaco.

Neither group of documents is subject to Tex. R. Civ. P. 76a, thus preventing any extension of the trial court's jurisdiction and preventing any violation of the federal constitution for failing to follow the guidelines set out in this rule.

1. Texas Rule of Civil Procedure 76a does not apply to documents submitted for in camera inspection.

The first group of documents to which Petitioner seeks to apply Tex. R. Civ. P. 76a are 21 safety related potential accident liability evaluations. These documents were the subject of a Motion for Protective Order filed by Texaco in the trial court. These documents were submitted to the trial court for an *in camera* inspection and were ruled to be exempt from discovery.

Rule 76a clearly does not apply to documents submitted for *in camera* review. Paragraph 2 of Rule 76a expressly excludes such documents from the application of the rule by providing:

Court records. For purposes of this rule, court records means:

a. All documents of any nature filed in connection with any matter before any civil court, except:

(1) documents filed with the court *in camera*, solely for the purpose of obtaining a ruling on the discoverability of such documents . . . .

Commentary to Rule 76a confirms that documents filed with the Court for *in camera* review are excluded from the application of this rule. *See Doggett and Mucchetti,* "Public Access to Public Courts: Discouraging Secrecy in the Public Interest", 69 TEX. L.R. 643, 662 (1991) ("the Rule does not alter existing discovery privileges").

One noted authority on Texas procedure has commented on the exclusion of documents filed for *in camera* review as follows:

> Access to documents in court files that are not defined as court records by Rule 76a remain governed by existing law. . . Rule 76a defines the term "court records" in some detail. Court records include all documents of any nature, filed in connection with any matter before any civil court, except for the following types of documents [T.R.C.P. 76a(2)(a)]:
>
> 1. Documents filed with a court *in camera* solely for the purpose of obtaining a ruling on the discoverability of the documents [see §94.02[4]].

DORSANEO, TEXAS LITIGATION GUIDE, §94.02[2] (Matthew Bender 1992). *See also* "Civil Procedure", 45 SOUTHWESTERN L.J. 85 (1991) ("the definition of court records contained in the Rule, however, expressly excludes documents filed *in camera* to obtain a discovery ruling"); McElhaney & Leatherburg, "An Overview; Proposed Rule 76a", 54 TEX. BAR J. 340 (April 1990) ("the term 'court records' does not include . . . documents filed with a court *in camera*"). Petitioner has failed to cite a single authority to

holds that Rule 76a does or should apply to documents submitted for *in camera* inspection in connection with the claim of privilege, in the face of the express language of Rule 76a(2)(a)(1) exempting such documents. As such, Rule 76a does not apply to this group of documents and the rule may not be used by Petitioner to extend the trial court's jurisdiction or as the basis for any constitutional argument based on failure to follow guidelines set out in the rule.

2. Texas Rule of Civil Procedure 76a does not apply to the remaining discovery documents.

Petitioner has alleged that the remaining discovery documents were the subject of a *de facto* sealing order either because of an April 1991 Protective Order signed by the trial court or because of the Order of Dismissal signed by the trial court. Neither of these arguments are supported by the record. Therefore, these discovery documents also cannot serve as a basis for Petitioner's constitutional arguments.

First, the Plaintiff in the underlying action, John R. Sexton's, lead counsel, Joan M. Lucci Bain, represented to the trial court in a letter dated May 8, 1992, that the documents to be returned to Texaco did not include documents which reflected conditions which may have had a probable adverse effect on the public. Additionally, Ms. Bain indicated in this letter that any documents produced by Texaco which did relate to safety inspections had been attached to pleadings made a part of the "record", and thus not sealed. *Id.* There was never any motion by any party to seal the court record in this matter.

Secondly, no complaint regarding the 1991 Protective Order was ever made by Petitioner in the trial court. It cannot be disputed that the various motions filed by

Petitioner in the trial court below failed to raise any issue of whether the 1991 Protective Order constituted a sealing order under Rule 76a. Judge Chambers was never allowed or afforded an opportunity to consider this contention. In fact, Petitioner first complained about the 1991 Protective Order as a potential violation of Rule 76a on December 11, 1992, in its response to Texaco's Motion to Dismiss Appeal, filed with the Court of Appeals for the Fourteenth Supreme Judicial District of Texas.

Petitioner has waived any right to now claim that the 1991 Protective Order constitutes a violation of Rule 76a by its failure to raise the issue at any time at the trial court level. It is well settled in Texas law that an objection to a court's ruling cannot be made for the first time on appeal. *Hollon v. Rethaber*, 643 S.W.2d 783 (Tex. App.--San Antonio 1982, no writ). In order to preserve the right of appeal, the issue must first be clearly raised, ruled on, and objected to at the trial court level. *Swinney v. Mosher*, 830 S.W.2d 187, 196-97 (Tex. App.--Fort Worth 1992, writ denied). Rule 52a of the Texas Rules of Appellate Procedure provides as follows:

> (a) General Rule. In order to preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. If the trial judge refuses to rule, an objection to the court's refusal to rule is sufficient to preserve the complaint. It is not necessary to formally except to rulings or orders of the trial court.

trial court.

In *National Lloyd's Ins. Co. v. McCasland*, 566 S.W.2d 565, 568 (Tex. 1978), the Texas Supreme Court confirmed the requirement for clearly identifying a complaint on a ruling in the trial court in order to preserve that error for appeal:

> This court has held on a number of occasions that when a motion fails to present a question in such a way that the trial court can clearly identify and understand it, the complainant is not entitled to raise the question in the court of civil appeals. *Meyer v. Great American Indemnity Co.*, 154 Tex. 408, 279 S.W.2d 575, 579 (1955); *Collins v. Smith*, 142 Tex. 36, 175 S.W.2d 407, 409 (1943).

The Texas Supreme Court, in *National Lloyd's*, went on to explain that a complainant cannot raise an entirely new basis for appeal at the appellate level:

> Further, when error is urged on one basis in the trial court, and on an entirely new and different basis in the court of civil appeals, the latter ground of complaint is not properly preserved for review. (citations omitted).

Id. at 568.

Finally, the order of dismissal signed by the trial court did not operate as a *de facto* sealing order bringing into operation Tex. R. Civ. P. 76a. As noted previously, any documents produced by Texaco which related to safety issues were attached as exhibits to pleadings filed by Sexton's counsel, Ms. Bain. At no time did the trial court grant a sealing order regarding the pleadings filed with the court in

this case. Under Rule 76a, motions for sealing orders and sealing orders themselves are distinctive, recognizable court actions with detailed procedural requirements. No effort was made to seal the record in this case. No sealing of the record occurred. As such, the documents returned as a result of the order of dismissal did not bring Tex. R. Civ. P. 76a into play or extend the trial court's jurisdiction.

As a result, the arguments presented by Petitioner regarding any alleged violations of constitutional provisions based on failure to follow guidelines set out by Tex. R. Civ. P. 76a are moot. The Petition for Writ of Certiorari should be denied.

III. The Texas Supreme Court did not violate any constitutional right of Petitioner by declining to recuse itself from consideration of this case.

Petitioner alleges that its constitutional rights were violated by the Texas Supreme Court's refusal to recuse itself from consideration of this case. Petitioner, however, failed to timely present the Texas Supreme Court with any valid or supportable reason to justify its extraordinary requested relief of recusing the entire Court. Based on this failure, the Petition for Writ of Certiorari should be denied.

A. Petitioner failed to timely present its Motion to Recuse

Texas Rules of Appellate Procedure allow a party to file a motion to recuse within thirty (30) days after the filing of a proceeding with the Texas Supreme Court. Tex. R. App. P. 15(a). The only exception to this deadline is if the party filing the motion can establish that the motion is grounded upon reasons not known within the thirty day period and that there is good cause for the late filing of the

motion. *Id.*

In the instant case, Petitioner filed its Application for Writ of Error with the Texas Supreme Court on September 15, 1993. Petitioner's Motion to Recuse was not filed until September 14, 1994, a full year after the institution of the proceeding before the Texas Supreme Court. Petitioner obviously failed to meet the deadline for the timely filing of its Motion to Recuse. In an attempt to escape this failure, Petitioner, in its Motion to Recuse and in its Motion for Rehearing, attempted to establish good cause for late filing of the Motion to Recuse by pointing to a factor belied by its own pleadings.

In its Motion for Rehearing before the Texas Supreme Court, Petitioner argued that it was unaware that the Court would be examining the merits of its case until a writ determination had been made. This allegation makes no sense, especially in light of the fact that the Application for Writ of Error filed by Petitioner with the Texas Supreme Court spent some twenty five (25) pages addressing arguments on the merits of the decisions below. It was upon these arguments as to the merits that Petitioner asked the Texas Supreme Court to grant its Application for Writ of Error.

Petitioner further argues that its failure to timely file its Motion to Recuse was somehow excused by its conclusion that the Texas Supreme Court exercised jurisdiction over this matter when the lower courts declined to do so. This is an incorrect interpretation of the Texas Supreme Court's writ disposition. As set out above, the trial court dismissed Petitioner's petition in intervention for want of jurisdiction because it was filed more than thirty days after the trial court had signed an order of dismissal in this case. The Texas Court of Appeals then dismissed Petitioner's appeal from the

trial court's order, also based on want of jurisdiction, because Petitioner failed to timely file its petition in intervention.

The Texas Supreme Court, in denying Petitioner's Application for Writ of Error did not implicitly rule that the lower courts had jurisdiction over this matter. Rather, the Texas Supreme Court merely held that while not satisfied that the court of appeals correctly stated the law in all respects, the application presented no error which required reversal, or which was of such importance to the jurisprudence of the State as to require correction. There was no jurisdictional defect in the appeal from the court of appeals to the Texas Supreme Court. Therefore, the designation of writ denied was entirely appropriate and cannot serve as the basis for a constitutional argument before this Court.

B. No outside panel was required to consider Petitioner's Motion to Recuse

Petitioner next argues that because Tex. R. App. P. 15(c) does not specifically address a situation in which a request is made that the entire Texas Supreme Court recuse itself from a matter, the Motion to Recuse should have been submitted to an independent panel for consideration. This argument is not well grounded because Tex. R. App. P. 15(c) does provide a mechanism for the determination of a motion to recuse a majority of the justices on the same court.

Tex. R. App. P. 15(c) provides:

> If a majority of the justices or judges are challenged, the court shall nonetheless decide the motion as to each justice or judge, one at a time, by a majority of the justices or judges

> sitting en banc except the particular justice or judge being considered each time shall not sit en banc to consider the motion as it directly affects that justice or judge.

This rule does not exclude situations in which the entire court has been asked to recuse itself. Rather, the rule provides an adequate mechanism for the consideration of a motion to recuse, even if that motion seeks to recuse the majority of justices on a court.

Petitioner further argues that Article V Section 11 of the Texas Constitution mandates the appointment of a special panel to consider its Motion to Recuse. This is simply untrue. This section of the Texas Constitution provides for the appointment of a special panel **after** the determination has been made that the entire Supreme Court should be recused. There is no provision for the appointment of a special panel to consider the actual motion to recuse. The Texas Supreme Court properly considered Petitioner's Motion to Recuse and properly denied same.

C. The Texas Constitution does not require recusal

Petitioner also argues that the Texas Supreme Court should have recused itself from consideration of this case because the Supreme Court building is within the alleged "danger zone" and because there are other judges in Texas who do not share this same interest. This argument ignores case law which is virtually on point with the facts of this case.

In *Hidalgo Cty. Water Improv. Dist. v. Blalock*, 301 S.W.2d 593, 596 (Tex. 1957), the Texas Supreme Court held that a trial judge who lived in the water district and purchased water from one of the parties was not disqualified

from hearing the case. In *Blalock*, the Texas Supreme Court specifically stated "[i]f his [the judge's] interest in the question is indirect, uncertain, or remote, and the result of the suit will not necessarily subject him to a personal gain or loss, he is not disqualified to sit in the case." *Id.*

Likewise, in *Nueces Cty. Drainage & Conservation Dist. v. Bevly*, 519 S.W.2d 938, 951 (Tex. Civ. App.--Corpus Christi 1975, writ ref'd n.r.e.), the Corpus Christi Court of Appeals held that the justices on the court who owned land within the drainage district and were taxpayers were not disqualified from hearing a suit involving the district. The Court specifically held that a judge is not disqualified to hear a case although he "may have a merely incidental, remote, contingent or possible pecuniary interest in the subject matter of the suit." *Id.*

In both of the above cited cases, as in this case, the judges made the subject of the motions to recuse had a higher interest in the case than other qualified jurists in the State of Texas by virtue of where they lived and worked. Nonetheless, that interest was not determined to be sufficiently direct to require recusal. Likewise, in the instant case, the interest alleged by Petitioner is at best speculative and remote. Such an interest is not the type that requires recusal from a case under the Texas Constitution.

D. Conclusion

Petitioner has failed to present this Court with any viable argument to support its position that the Texas Supreme Court's denial of its Motion to Recuse is violative of any federal constitutional standard. The procedure used in considering the Motion to Recuse, as well as the decision ultimately made, were within the guidelines set by Texas law. Petitioner cannot show any violation of the federal

constitution. Therefore, the Petition for Writ of Certiorari should be denied.

CONCLUSION

Petitioner has failed to preserve any federal question for review by this Court, thus denying this Court any jurisdictional basis for granting Petitioner's request for Writ of Certiorari. Further, Petitioner has failed to present any valid question regarding the constitutional implications of Texas Rule of Civil Procedure 76(a) because Petitioner failed to timely intervene in the underlying lawsuit and because no sealing order was ever entered which would require compliance with Texas Rule of Civil Procedure 76(a). Finally, no constitutional right of Petitioner has been implicated by the Texas Supreme Court's refusal to recuse itself from consideration of this case. Based on the foregoing, Texaco requests that this Court deny the Petition for Writ of Certiorari filed by Texans United Education Fund. Texaco also requests all other relief to which this Court may find it entitled.

Respectfully submitted,

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